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NO.____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

CARMINE ROMANO,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS J. MARTINE
DOLAN, McMAHON & MARTINE
*Attorneys for Petitioner*
120 Broadway
New York, N.Y. 10271
(212) 732-8618

NORMAN A. OLCH
*Of Counsel on the Petition*
233 Broadway
New York, N. Y. 10279
(212) 964-6171

Dick Bailey Printers 290 Richmond Avenue ■ Staten Island, New York 10302
TEL.: (212) 447-5356 – (516) 222-2470 – (914) 682-0848

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## QUESTIONS PRESENTED

1. Whether the familiar banking practice of awarding gifts on a non-preferential basis to new depositors is embraced by 18 U.S.C. 1954, and whether the Circuit Court's conclusion that it is so embraced is wholly at odds with the legislative history and purpose of the statute, and is in conflict with this Court's opinion in *Williams v. United States* rendered after the Circuit Court's decision?

2. Whether the Second Circuit's rule permitting a conviction of 29 U.S.C. 186(b) (Taft-Hartley Act) without proof of *mens rea*, (A) conflicts with the rule in the Seventh and Tenth Circuits and (B) in a "RICO" prosecution unconstitutionally enhances to a serious felony the simultaneous conviction of two non-*mens rea* misdemeanors?

3. Whether the automatic closing of the courtroom doors during the charge to the jury merely because this has been the practice since time immemorial, violated the right to a public trial and conflicts with this Court's decision in *Globe Newpaper Co. v. Superior Court*?

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## OPINION IN THE COURT BELOW

The decision of the United States Court of Appeals for the Second Circuit, which gives the reasons for the affirmance of the judgment of conviction, is set forth in the Appendix at page 1a.

## GROUNDS FOR JURISDICTION OF THIS COURT

Judgment of conviction was entered in the United States District Court for the Southern District of New York on February 5, 1982, and the order of the United States Court of Appeals for the Second Circuit affirming the judgment of conviction was entered on June 24, 1982. This Court has jurisdiction to review the judgment of the Circuit Court by Writ of Certiorari pursuant to 28 U.S.C. 1254.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Amendments V and VI of the United States Constitution. These are set forth in the Appendix at pp. 21a.

## STATUTORY PROVISIONS INVOLVED

This case involves 18 U.S.C. 1954; 18 U.S.C. 1961; 18 U.S.C. 1962; and 29 U.S.C. 186. These are set forth in the Appendix at pp. 22a-27a.

## STATEMENT OF FACTS

This appeal raises for consideration the interpretation of statutes which have assumed an ever growing importance in federal law enforcement — offenses which serve as the predicate for a determination that an individual has engaged in a "pattern of racketeering" under the "RICO"* statute, 18 U.S.C. 1961 et seq. Unfortunately, the Circuit Court's interpretation is wholly at odds with the legislative history of the statute and the import of this Court's recent decision in *Williams v. United States*, __U.S.__ (1982).

*Racketeer Influenced and Corrupt Organizations

The Circuit Court effectively turns into a federal crime activity never contemplated by Congress and traditionally left to the states or to civil remedies. In addition, the appeal raises for consideration petitioner's right to a public trial and an interpretation of that right by the Circuit Court which is at odds with this Court's recent decision in *Globe Newspaper Co. v. Superior Court.* __U.S.__ (1982).

The facts are not in dispute. Petitioner's conduct for the most part was established by documentary evidence, the content of which he did not challenge in any way. He contends, however, that the conduct simply is not a federal crime.

**A. Predicate Offense One: 18 U.S.C. 1954.**

Petitioner was indicted for violating 18 U.S.C. 1962(d) (RICO conspiracy), 18 U.S.C. 1962(c) (RICO substantive offense), 18 U.S.C. 1954 (acceptance of a thing of value to influence an employee benefit plan), 29 U.S.C. 186(b)(1) (aiding and abetting receipt of illegal labor payments under the Taft Hartley law) and 18 U.S.C. 1951 (extortion). The conduct alleged under Section 1954 and the Taft Hartley counts also provided the basis for the pattern of racketeering activities alleged under the RICO counts. Petitioner was convicted on all counts except extortion which was dismissed by the District Judge after the Government offered no evidence to sustain it.

Petitioner was the Secretary-Treasurer of Local 359 of the Seafood Workers Union from May 1974 until May 1980. The local represents all the workers who handle fish at the Fulton Fish Market in Manhattan, the center of metropolitan New York's wholesale fish

industry. Petitioner was also an employee trustee of the Fulton Fish Market Welfare and Pension Fund.

The evidence showed that Republic National Bank in New York was making the familiar offer of gifts (known as "premiums") in return for depositors opening new accounts. If the depositor withdrew the principal before a specific period of time had elapsed, an interest penalty was imposed by the bank. Under the bank rules, the depositor or owner of the funds could not receive the premium. Instead, the depositor named a "sponsor" to receive the gift. The sponsor in turn could designate anyone else to actually receive the gift. A trustee of the Welfare Fund could not be a sponsor.

The evidence showed that from December 1974 through June 1977 the Welfare Fund opened 11 time deposit accounts with Republic National Bank, ranging in amount from $2,250 to $53,250. In each instance the application and bank agreement were signed by two or three trustees of the fund. Petitioner signed both documents for seven of the deposits. The bank records show that for three of the eleven deposits Petitioner was designated by the sponsors to receive the television sets which were the premiums. On the other occasions a relative or friends of Petitioner received the television sets.

The evidence also showed that all the deposits were made in the name of the Welfare Fund; that the bank was aware it was making gifts in return for the deposit of union pension funds; that the gifts awarded Petitioner or his friends were the same as would be given to any other member of the public making a similar deposit; and that Petitioner and the Welfare

Fund received no preferential treatment regarding the bank penalties to be imposed if the deposits were withdrawn before a specific date. In sum, this gifts-for-deposits arrangement was exactly the same as was open to all members of the public.

It was the contention of the Petitioner that this widespread and legal gifts-for-deposit arrangement is not the type of corrupt kickback scheme Congress intended to embrace within 18 U.S.C. 1954. For the reasons to be discussed below, *infra* p.7, the Circuit Court concluded otherwise.

B. Predicate Offense Two: 29 U.S.C. 186(b)(1)

The evidence relevant to the Taft-Hartley violation was similarly undisputed. In order to increase revenues, Petitioner suggested that Local 359 rent to the fish wholesalers plaques indicating the wholesaler employed union labor. The union adopted the practice and for approximately four years the union rented the plaques pursuant to written agreement for $25 per month. The record shows that all rental payments were made by check and were deposited in the union's bank account. The union kept complete records of all the payments. There are over 80 wholesalers in the Fulton Fish Market and over 30 did not rent the plaque. There is no indication of any union reprisals against a wholesaler who did not rent a plaque. Wholesalers who did rent the plaque, but fell behind in payments, were sent delinquency notices. Although no wholesalers appear to have formally cancelled the agreement, some wholesales had not paid for so many months that there was a *de facto* cancellation.

Petitioner argued in the District Court and the Court of Appeals that the Taft-Hartley violation required proof of *mens rea*. In accordance with many Second Circuit rulings, this argument was rejected. The trial court's charge appears in the Appendix at pp. 19a-20a.

C. Elevating Non-*Mens Rea* Misdemeanor Into Felonies.

Under the indictment the jury could have found that the pattern of racketeering required for the RICO offenses was based on two violations of the Taft Hartley statute — 29 U.S.C. 186(b)(1), which is a misdemeanor. Because under the Second Circuit rule the Taft Hartley violations did not require proof of *mens rea*, Petitioner argued that enhancing the simultaneous conviction of two non-*mens rea* misdemeanors into a 20 year felony* is unconstitutional. The argument was rejected below.

D. The Right to a Public Trial.

Prior to the charge to the jury, Petitioner objected that the right to a public trial was being violated when the court locked the courtroom doors and denied access to the public during the charge. The court indicated that nobody would be "permitted to enter and distract everybody, except the court reporters, and they are going to be permitted to enter and leave."** (Tr. 1490).** The District Judge also stated, "I am go-

*Petitioner received a sentence of 12 years.

**References are to pages of the trial transcript.

ing to continue to do what has been going on since I can remember back until the memory of man runneth not to the contrary." (Tr. 1491). The court made no particularized finding of the need to close the doors in this case.

## ARGUMENT

### POINT I

### THE FAMILIAR BANKING PRACTICE OF AWARDING GIFTS ON A NON-PREFERENTIAL BASIS TO NEW DEPOSITORS IS NOT EMBRACED BY 18 U.S.C. 1954, AND THE CIRCUIT COURT'S CONCLUSION THAT IT IS SO EMBRACED IS WHOLLY AT ODDS WITH THE LEGISLATIVE HISTORY AND PURPOSE OF THE STATUTE, AND IS IN CONFLICT WITH THIS COURT'S OPINION IN *WILLIAMS v. UNITED STATES* RENDERED AFTER THE CIRCUIT COURT'S DECISION.

In *Williams v. United States*, __U.S.__ (decided June 29, 1982), this Court cautioned against interpreting a criminal statute in such a way as to make "a surprisingly broad range of unremarkable conduct a violation of federal law." 50 U.S.L.W. 4951. By ruling that the receipt of a bank's standard gift-for-deposit is a violation of 18 U.S.C. 1954, the Circuit Court engaged in just such a sweeping interpretation of federal law. Because Section 1954 is an important penal statute which has never been interpreted by this

Court, and because the Circuit Court's sweeping interpretation cannot be squared with the legislative history, the Writ of Certiorari should be granted.

The Circuit Court correctly did not base its decision on the fact that Section 1954 explicitly punishes any trustee of an employee pension benefit plan who received a "gift" because of his actions or decisions as a trustee. As this Court has noted, it is a "familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers." *United Steelworkers v. Weber*, 443 U.S. 193, 201 (1979) quoting from *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892). The principle "has particular application in the construction of labor legislation which is 'to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests.'" *National Woodwork Mfrs. Assn. v. N.L.R.B.*, 386 U.S. 612, 619 (1967).

Indeed, the legislative history of Section 1954 exemplifies the Court's observation that "The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect." *Watt v. Alaska*, __U.S.__, 101 S.Ct. 1673, 1677-1678 (1981).

The Circuit Court concluded that "the broad language used in the statute reflects Congress's in-

tent to reach all fiduciaries who profit (other than by their regular compensation) as the result of their decisions to invest union pension funds." (Opinion, App. 13a). The legislative history, however, simply does not support the conclusion that every such conflict of interest was intended by Congress to be a federal crime.

From the legislative history it is abundantly clear that Section 1954 was intended to deal with corrupt, illicit and generally secretive payments to pension fund trustees — bribes, kickbacks and payoffs. The statute was enacted in response to President Eisenhower's criticism of a previous union pension law which did not deal directly with the most flagrant pension abuses such as embezzlement* and kickbacks. House Report No. 998, 1962 U.S. Code Cong. and Adm. News p. 1532, 1533-1534.

Congress' concerns were expressed in detail in Senate Report No. 908, 87th Congress, 1st Session. This report is of particular significance because in the House-Senate conference the Senate's language for Section 1954 was adopted. 108 Cong. Rec. 4250 (1962).

At the outset the report indicates that the purpose of the legislative proposals is to:

> "provide criminal penalties for offering, accepting, or soliciting bribes or kickbacks in connection with the administration of these plans, stealing or embezzling plan funds or property, or making false statements in any document published or maintained pursuant to the act." S.R. 908 at 2.

*References in the Legislative history to embezzlement relate to 18 U.S.C. 664 which was enacted with Section 1954.

Legislative investigation determined that the greatest evils were the kickbacks and payoffs:

"Perhaps the greatest single abuse in the administration and operation of these plans is the kickback or payoff to influence the investment of the assets of the funds. The accessibility and use of vast sums of money by brokers and recipients may in these cases depend upon the willingness to kickback part of the broker's commission to administrators, officers, trustees, employees, and other individuals associated with the fund. In such matters the brokers may ask for fees well in excess of the usual percentage in order to permit the payment of the kickback without impairing the size of the commission for themselves. Kickbacks may take the form of cash, stocks, bonds, loans, undisclosed interests in the business venture receiving the loan, favors, preferred treatment or free services. The kickback may be paid by the broker, the loan recipient or by third parties at the recipient's direction. The loan itself may be made directly by the welfare and pension fund or may be made indirectly through a cloaking device involving third parties. In some of these cases letters of commitment may be issued by the officers of the plan, obligating the funds to make loans at future specified dates. The letters of commitment are then used as a basis for obtaining loans from banks or other lending institutions. In all of these cases, favorable action by the fund is induced by the kickbacks and payoffs." S.R. 908 at 4-5.

Section 1954 was then aimed at the kickback problem:

"A new section 1954 would also be added to the Criminal Code which would prohibit the giving or offering or the solicitation or receipt of kickbacks involving the fiduciaries associated with the plan, the

representatives of an employer related to the plan, the representatives of unions similarly related to the plan or the representatives of an organization, such as an accounting firm or an investment broker, providing services to the plan." (S.R. 908 at 11.

Also reflective of the type of abuse at which 1954 was aimed is the fact that Congress felt an immunity provision was needed, too, "for the effective prosecution of violators of this section in view of the clandestine and secretive methods which have been developed by parties to kickbacks and payoffs within the prohibitions of this section." S.R. 908 at 11.*

The view was the same in the House. 18 U.S.C. 664 was aimed at embezzlement, and Section 1954 was directed at kickbacks. House Report No. 998, 1962 U.S. Cong. and Adm. News p. 1532, 1533-1534. On the floor of the House, Representative Roosevelt said the bill was designed to punish "kickbacks", 108 Cong. Rec. 1730, and Representative Smith of Iowa, the author of the House bill,** said the package of bills was intended to make "embezzlement, kickbacks, bribery and looting from these funds Federal felonies." 108 Cong. Rec. 1739.

It is therefore apparent that Section 1954 was aimed at highly corrupt practices and arrangements designed to influence fund trustees' investment and use of pension funds.

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*The Report also expresses concern about "collusion" between fund administrators and others. S.R. 908 at 4.

Against this legislative backdrop it is apparent that the "gift" to Petitioner is not embraced by Section 1954. The record shows Petitioner learned of the gifts for deposits from a newspaper advertisement. The deposits were made in the name of the pension fund and they were legal and regulated by federal law;* the bank was aware it was making gifts in return for the deposit of union pension funds; the gifts awarded Petitioner or his friends were exactly the same as would be given to any other member of the public making a similar deposit; and Petitioner and the Fund received no preferential treatment regarding the bank penalties to be imposed if the deposits were withdrawn before a specific date. There is also absolutely no evidence that Petitioner sought to negotiate or secure preferential treatment for himself or the pension fund from the bank. In sum, there was no kickback, payoff or bribe here.

Of perhaps even more significance than the Senators' views are the views of the Department of Justice at the time the legislation was pending in Congress. These views are important because the Department is the agency charged with the enforcement of the statute and the Department explained its interpretation of the statute to the Congress while the bill was pending. *United States v. Board of Commissioners*, 435 U.S. 110, 131-132 (1978); *Bellotti v. Baird*, 428 U.S. 132, 143 (1976); *Summit Airlines v. Teamsters Local No. 295*, 628 F.2d 787 (2nd Cir. 1980) (statements of attorney representing group which drafted legislation are given great weight in construing the statute).

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*See, e.g. 12 CFR 217.147.

The Department's views are incorporated in Senate Report No. 908 and there is therefore good reason to believe the Congress agreed with and adopted the Department's views. *United States v. Board of Commissioners, supra* at 135. Responding by letter to a request to state the Department's views on the need for new criminal provisions in the welfare and pension field, then Assistant Attorney General Herbert J. Miller, Jr. indicated that the Department's experience "indicates that the abuses in the area are often highly sophisticated and effective." S.R. 908 at 14. He then went on to describe the problem:

> "Although kickbacks for the benefit of pension fund administrators can take many forms, one complex example is the use of the straight bribe to obtain a loan from the fund. To achieve this result a cash payment is made prior to obtaining the loan to a third party ostensibly unrelated to the fund. The loan itself will then be made in an amount large enough to cover the previous payoff with high-risk real estate or otherwise questionable security as collateral. The bribe or kickback is consummated when the third party passes part or all of the bribe back to the trustees of the fund.
>
> "Where the fund is unable to lend the money immediately, a letter of credit can often be purchased to achieve similar ends. The letter of credit makes interim financing possible, and actual financing is usually secured from legitimate sources after the high-risk hotel or restaurant, for example, is constructed. Sometimes the bribe takes the form of a part interest given to a third party in the business venture to be financed, or the loan will be obtained from a friendly bank in return for a time deposit by the fund. Each of these transactions, often involving millions of dollars, result in an improper exercise of the administrator's fiduciary responsibilities." S.R. 908 at 15.

The letter then gave the Department's views on the purpose and intent of the legislation:

> "The proposed criminal provisions presently pending before the subcommittee are designed to strike at the very heart of these abuses. These proposals make the embezzlement of welfare or pension funds a Federal crime and prohibit the making of kickbacks to fund fiduciaries, and provide a criminal sanction to implement more effectively the disclosure of the act.
>
> *Although the kickback provisions could technically be read to prohibit the smallest gift, the legislation is designed solely to deal with the complex transactions outlined above, and the Department has no desire to police customary and de minimis business or social gratuities.*" S.R. 908 at 15-16. (emphasis supplied).

Thus, the Justice Department clearly disavowed a "technical" reading of the statute and indicated that Section 1954 was aimed at punishing illicit kickback-type arrangements which seriously compromise the trustee. Customary business gratuities—such as the standard bank gift-for-deposit—were clearly not embraced by Section 1954 according to the Department.

In light of the foregoing history, the Circuit Court's reliance on the isolated remark of one Senator that the statute is intended to establish "Federal criminal sanctions for violations of trust" (App. 13a) is wholly unpersuasive. Indeed the general Congressional approach has been to impose civil penalties for a trustee's breach of his fiduciary responsibilities, Employee Retirement Income Security Act, 29 U.S.C.

1109,* and the Second Circuit itself has agreed that a trustee's breach of his fiduciary duty is not automatically translatable into a crime. *U.S. v. Snyder*, 668 F.2d 686, 691 (2nd Cir. 1982).**

In the final analysis the Circuit Court seemed concerned that if Petitioner's conduct did not violate Section 1954 it probably was not a federal crime at all. (App. 14a). But this is not justification for wrenching 1954 from its legislative history and claiming there is criminal liability for acts not within Congress' intention.

The implications are serious. Because Section 1954 makes the donor and the recipient of the "gift" equally liable, the Circuit Court's opinion creates criminal liability for the banking community, too. Yet, it is unimaginable that Congress intended that

*29 U.S.C. 1109 is set out in the Appendix at p. 27a.

**Before the Circuit Court the Government agreed that Petitioner's deposit of the pension funds was not unlawful. Nor was his mere receipt of the television sets unlawful. What is criminal, argued the Government, is that Petitioner kept the gifts for himself instead of passing them on to the pension fund. (Gov. Br. 25-26). The Circuit Court seemingly accepted this hypothesis. But guilt based on such a hypothesis conflicts with *U.S. v. Carbone*, 327 U.S. 633 (1946), in which the Court noted that what an individual did with lawfully received funds "cannot operate retroactively" to make receipt of the funds a crime. See also, *Arroyo v. United States*, 359 U.S. 419 (1959).

bankers could be criminally liable for the widespread use of non-preferential gifts-for-deposits.*

Every wrong is not a federal crime. Because the Second Circuit has enlarged 1954 beyond its intended scope; and because Section 1954 is an important statute in federal law enforcement, being a predicate for establishing a pattern of racketeering activity under RICO, the writ should be granted.

## POINT II

## THE SECOND CIRCUIT'S RULE PERMITTING A CONVICTION OF 29 U.S.C. 186(b) (TAFT-HARTLEY) WITHOUT PROOF OF *MENS REA*, (A) CONFLICTS WITH THE RULE IN THE SEVENTH AND TENTH CIRCUITS, AND (B) IN A "RICO" PROSECUTION, THE RULE UNCONSTITUTIONALLY ENHANCES TO A SERIOUS FELONY THE SIMULTANEOUS CONVICTION OF TWO NON-*MENS REA* MISDEMEANORS.

### A. Conflict in the Circuit Over *Mens Rea* Requirement

A long line of cases in the Second Circuit holds that proof of a violation of 29 U.S.C. 186(b) does not require evidence of *mens rea*. The Government need not prove the defendant acted with a bad purpose or with knowledge his conduct was unlawful; it need only prove in the case of a union official that he received

*In this case, nothing distinguishes the conduct of Republic National Bank from Petitioner's inasmuch as the bank knew it was giving gifts for pension fund deposits. At oral argument before the Second Circuit, the Government could not advance any distinction.

money from a person he knew was an employer of the persons he represented. *U.S. v. Ricciardi*, 357 F.2d 91 (2nd Cir. 1966) *cert. denied*, 384 U.S. 942, 385 U.S. 814 (1966); *U.S. v. Overton*, 470 F.2d 761 (2nd Cir. 1972) *cert. denied*, 411 U.S. 919 (1973); *U.S. v. Boylan*, 620 F.2d 359 (2nd Cir. 1980) *cert. denied*, 449 U.S. 833 (1981); *U.S. v. Scotto*, 641 F.2d 47 (2nd Cir. 1980) *cert. denied*, __U.S.__, 101 S.Ct. 3109 (1981).

The Second Circuit's view is based on this Court's dictum in *U.S. v. Ryan*, 350 U.S. 299, 305 (1956), that the statute "appears to be a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative."

But the Seventh and Tenth Circuits have offered different interpretations. Thus, in *U.S. v. Inciso*, 292 F.2d 374 (7th Cir. 1961) *cert. denied*, 368 U.S. 920 (1961), the Seventh Circuit expressly ruled that "willfully violates" in Section 186 "contemplates proof of an awareness of the restrictions of that section or a reckless disregard for the section." 292 F.2d at 380.

The Seventh Circuit maintained this standard in two later cases, *U.S. v. Keegan*, 331 F.2d 257 (7th 1964) *cert. denied*, 379 U.S. 828 (1964), and *U.S. v. Kaye*, 556 F.2d 855 (7th Cir. 1977) *cert. denied* 434 U.S. 921 (1977), indicating that "the minimum proof to convict under Section 186 is that defendant showed 'reckless disregard for that section.' " 331 F.2d 262. Observing that recklessness is based on two elements—actual knowledge of the facts surrounding the event and knowledge the conduct is likely to be illegal—the Court noted the second el[illegible] can be

established by the objective reasonable man test and went on to uphold charges containing only the first element of recklessness—knowledge the money came from an employer—because as a matter of law in those cases the reasonable man test was satisfied. In a later case, *U.S. v. Simpson*, 561 F.2d 53 (7th Cir. 1977), the Circuit explained that in *Keegan* and *Kaye* the reasonable man test was applied by the court as a matter of law. 561 F.2d 62 n.12. There has therefore been no abandonment or departure from *Inciso*.

Similarly, the Tenth Circuit has described as "accurate" a charge which required knowledge the conduct was unlawful or a disregard for whether the conduct is lawful or not. *Korholz v. United States*, 269 F.2d 897 (10th Cir. 1959) *cert. denied* 361 U.S. 929 (1960).

The views of the Seventh and Tenth Circuits are in accord with this Court's view that in a criminal statute "willfully" "generally means an act done with a bad purpose," or "a thing done without ground for believing it is lawful," or "conduct marked by careless disregard whether or not one has the right so to act." *U.S. v. Murdock*, 290 U.S. 389, 394 (1933).

As this Court has noted, strict liability laws have a "generally disfavored status," *U.S. v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978), and have been limited to matters inherently dangerous to the public health, welfare or morals. *U.S. v. Balint*, 258 U.S. 250 (1922) (drugs); *U.S. v. Dotterweich*, 320 U.S. 277 (1943) (pharmaceuticals); *U.S. v. Freed*, 401 U.S. 601 (1971) (weapons). These considerations are not applicable to a Section 186 violation.

In language that could be applicable to Section 186, the Court has observed that the use of strict liability

> "would be difficult to square with the generally accepted functions of the criminal law . . . The criminal sanctions would be used, not to punish conscious and calculated wrongdoing at odds with statutory prescriptions, but instead simply to *regulate* business practices regardless of the intent with which they were undertaken." *United States v. United States Gypsum Co., supra*, 438 U.S. at 442. (emphasis in original).

Section 186(b) is an important penal provision not only in its own right, but also because it is a predicate offense for a RICO prosecution. Because the Second Circuit's view marks a departure from the generally limited applicability of strict liability crimes, and because the Circuit's view conflicts with other Circuits, the writ should be granted.

### B. Unconstitutionally Enhancing Non-*Mens Rea* Misdemeanors Into Felonies

Because two Taft Hartley violations form the basis for finding a pattern of racketeering under the RICO statute, 18 U.S.C. 1961, the Second Circuit's interpretation of Section 186 means that in a RICO case the simultaneous conviction of two non-*mens rea* misdemeanors is enhanced to a serious 20 year felony. This is unconstitutional.

Imposition of a severe penalty for a crime which does not require proof of *mens rea* can violate Due Process as well as the Eighth Amendment. *Lambert v. California*, 355 U.S. 225, 231 (1957) (Frankfurter, J. dissenting); *Holdridge v. United States*, 282 F.2d 302

(8th Cir. 1960) (Blackmun, J.), cited with approval, *United States v. Freed*, 401 U.S. 601, 613 n.4 (1971) (Brennan, J. concurring).

It is clear that Congress can severely enhance the punishment meted out for a felony because of a defendant's previous convictions. *Rummel v. Estelle*, 445 U.S. 263 (1980). It also seems clear that a second conviction of a misdemeanor can become a felony, at least when counsel has represented the defendant on both occasions. *Baldasar v. Illinois*, 446 U.S. 222 (1980).

But these and other decisions upholding recidivist statutes lend no support to the RICO statute which, under the Second Circuit's interpretation of Section 186(b), enhances two violations of a misdemeanor requiring no *mens rea* into a felony punishable by up to 20 years imprisonment.

The recidivist statutes are different from RICO in two important respects. First, as in *Rummel v. Estelle* the statutes require proof of *mens rea*. Second, under recidivist statutes conviction of the predicate offense or offenses occurs at different times, not simultaneously as under RICO. Thus, under a recidivist statute, even if the crimes did not require *mens rea*, the first conviction would at least put the offender on notice that certain future conduct will be deemed criminal. Under RICO, however, because the 186 convictions occurred simultaneously, the appellant was never put on notice that seemingly innocent conduct would subject him to a very severe sentence.

In *Jones v. Helms*, __U.S.__, 101 S.Ct. 2434 (1981), the Court examined the constitutionality of a

statute which made it a misdemeanor for a parent to abandon a child and a felony if the parent left the state after the abandonment. In upholding the constitutionality of the law the Court was very careful to note that while the statute required no *mens rea* for the departure from the state, the underlying abandonment did require criminal intent or wilfullness. This saved the statute from the infirmity mistakenly attributed to it by the lower court: converting a series of "noncriminal acts" into a felony. 101 S.Ct. 2438 n.10. With one element of the crime requiring proof of *mens rea*, it was proper to enhance the misdemeanor to a felony because "the State may treat the entire sequence of events, from the initial offense to the departure from the State, as more serious than its separate components." 101 S.Ct. at 2441.

But according to the Second Circuit two 186 violations are enhanced to a severe felony which is "more serious than its separate components," without any *mens rea* requirement. This conversion of a series of "noncriminal acts" into a felony is a violation of Due Process as well as the proscription against cruel and unusual punishments. The writ therefore should be granted.

## POINT III

### THE AUTOMATIC CLOSING OF THE COURTROOM DOORS DURING THE CHARGE TO THE JURY MERELY BECAUSE THIS HAS BEEN THE PRACTICE SINCE TIME IMMEMORIAL, VIOLATED THE RIGHT TO A PUBLIC TRIAL AND CONFLICTS WITH THIS COURT'S DECISION IN GLOBE NEWSPAPER CO. V. SUPERIOR COURT.

Because a "presumption of openness inheres in the very nature of a criminal trial under our system of justice," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, (1980) (plurality opinion), the automatic closing of a portion of the trial to the public without particularizing the need for the closure violates the right to a public trial under the First and Sixth Amendments. *Globe Newspaper Co. v. Superior Court*, __U.S.__(1982).

The trial court closed the courtroom during the charge because he did not want any distractions and because "I am going to continue to do what has been going on since I can remember back until the memory of man runneth not to the contrary." (Tr. 1491).

But there is no evidence that closure was required to insure a quiet courtroom and an attentive jury. Crowds of spectators or journalists had not been entering or leaving the courtroom during the earlier portions of the trial. And although the trial judge would not let members of the public enter during the charge, he did state he would allow the court stenographers to enter and leave. (Tr. 1490).

The court's ruling also effectively elevates the charge to the jury to a place not occupied by any other phase of the trial. Yet a logical argument can be made that the defendant's own testimony or counsel's closing arguments to the jury are as important as, if not more important than, the charge to the jury. Yet the courtroom is not closed during these moments in the trial on the chance that the jury may otherwise be distracted by an entering spectator.

By referring to a footnote in this Court's opinion in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581-82 n. 18 (1980), the Circuit Court suggested that this was a reasonable time, place and manner restriction. (App. 17a). But the footnote's concern that trials be conducted "in a quiet and orderly setting," or that the limited seating capacity of a courtroom may necessitate reasonable access restrictions, are inapposite to this case. There is absolutely no showing that the charge would not have occurred in a quiet and orderly setting had the doors remained unlocked, and no showing that attendance had exceeded the courtroom's capacity. No one was clamoring to enter the courtroom, and apparently no one actually tried to enter during the charge.* The fact that some spectators were present in the courtroom is not dispositive because the right to a public trial does not depend on all persons arriving at the appointed hour, particularly where, as here, there was no advance public notice of the time of closure. *cf U.S. v. Criden*, 675 F.2d 550 (3rd Cir. 1982).

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*The defendant's right to a public trial does not depend, of course, on his being able to identify a particular member of the public who wanted to gain access to the courtroom.

Counsel's research discloses no federal case which has passed on the issue raised here. The petition by co-defendant Peter Romano, which Petitioner hereby adopts, indicates that state cases which have examined the issue have concluded that closure during the court's charge violates the right to a public trial. (Pet. for P. Romano, pp. 4-8).

As the trial court observed, closure during the charge is the established procedure. But longevity is not to be confused with constitutionality. Because this appeal concerns an automatic but unconstitutional practice which occurs at many criminal trials, the writ should be granted.

## CONCLUSION

**THE WRIT OF CERTIORARI SHOULD BE GRANTED.**

Respectfully submitted,

LOUIS J. MARTINE
NORMAN A. OLCH

# UNITED STATES COURT OF APPEALS

## FOR THE SECOND CIRCUIT

No. 1175, 1185—August Term, 1981

(Argued May 26, 1982 Decided June 24, 1982)

Docket No. 82-1052, 82-1054

UNITED STATES OF AMERICA,

*Appellee,*

—against—

CARMINE ROMANO and PETER ROMANO,

*Defendants-Appellants.*

Before:

LUMBARD, MOORE and OAKES,

*Circuit Judges.*

Defendants appeal from judgments of conviction entered in the Southern District of New York, Gagliardi, *J.*, for racketeering conspiracy, racketeering, perjury, ob-

struction of justice, Taft-Hartley violations, and misuse of pension funds.

Affirmed.

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ROBERT LEWIS COHEN, ESQ., New York, N.Y., *for Defendant-Appellant* Peter Romano.

NORMAN A. OLCH, ESQ., New York, N.Y. (Dolan, MacMahon & Martine, New York, N.Y., Louis J. Martine, Esq., of counsel; William Lupo, Legal Assistant), *for Defendant-Appellant* Carmine Romano.

DANIEL H. BOOKIN, Assistant United States Attorney (John S. Martin, Jr., United States Attorney for the Southern District of New York, Andrew J. Levander, Walter P. Loughlin, Assistant United States Attorneys, of counsel), *for Appellee.*

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LUMBARD, *Circuit Judge:*

Carmine and Peter Romano appeal from judgments of conviction entered on February 5, 1982, in the Southern District of New York, following a jury trial presided over by the Hon. Lee P. Gagliardi. The Romanos were convicted for their roles in a racketeering conspiracy to extract protection money from the wholesalers in the

Fulton Fish Market. They accomplished this through their control of the union representing the workers in the market. Specifically, both defendants were convicted of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d); of violating RICO, 18 U.S.C. § 1962(c); and of aiding and abetting violations of the Taft-Hartley Act, 29 U.S.C. § 186(b)(1) and 18 U.S.C. § 2. In addition, Carmine Romano was convicted of misusing union pension funds, 18 U.S.C. § 1954 and 18 U.S.C. § 2; and Peter Romano was convicted of obstruction of justice, 18 U.S.C. § 1503, and perjury before a grand jury, 18 U.S.C. § 1623. Prior to jury deliberations, the government dropped one count of extortion, 18 U.S.C. § 1951, charged against Carmine. The court sentenced Carmine to twelve years in prison and a fine of $20,000; Peter received a sentence of eighteen months' imprisonment. Finding no errors in the district court's rulings of law or in its conduct of the trial, we affirm.

In October 1981, the Romanos were charged in a 167-count indictment. Their alleged co-conspirators were severed prior to trial and the Romanos were tried on a redacted indictment of 94 counts.

Count One charged the defendants with conspiring to conduct the affairs of the Fulton Fish Market through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(d). The predicate acts of racketeering activity were alleged to include "among other things, acts of extortion in violation of Title 18, United States Code, Sections 1951 and 2; payment and receipt of illegal labor payments in violation of Title 29, United States Code, Section 186 and Title 18, United States Code, Section 2; misuse of welfare and pension plan funds in violation of Title 18, United States Code, Sections 1954 and 2; and obstruction of

justice in violation of Title 18, United States Code, Section 1503."

Among the objects and means of the conspiracy, it was charged that the defendants: (1) "would and did request and receive through, among other things, the use of fear, cash payments and other things of value from businesses in the Fulton Fish Market;" (2) "would and did request and receive through, among other things, the use of fear, approximately $66,450 from businesses in the Fulton Fish Market, supposedly in return for renting cardboard signs stating that said businesses employed members of Local 359;" (3) "did request and receive through, among other means, the use of fear, payments from businesses in the Fulton Fish Market in return for 'protection' against thefts and robberies, and did operate a protection service known as the Fulton Patrol Service . . . ;" and (4) "received for their own use and the use of their relatives and friends numerous things of value in return for depositing the funds of the Fulton Fish Market Welfare and Pension Funds into a particular bank."

Count Two charged the defendants with a substantive RICO violation, 18 U.S.C. § 1962(c). The predicate acts of racketeering activity alleged were the receipt by Carmine and Peter Romano of illegal payments in violation of 19 U.S.C. § 186(b)(1); the misuse of union pension funds by Carmine Romano, in violation of 18 U.S.C. § 1954; and the obstruction of justice by Peter Romano in violation of 18 U.S.C. § 1503.

Carmine was also charged with twelve counts of violating 18 U.S.C. § 1954 and 18 U.S.C. § 2 in connection with the receipt by him and others of television sets from the Republic National Bank as gifts for sponsoring the opening of new accounts with moneys from the union pension fund.

Counts Fifteen through Sixty and Sixty-one through Ninety-one charged Carmine and Peter respectively with aiding and abetting violations of the Taft-Hartley Act in connection with the rental of cardboard union signs to employers in the Fulton Fish Market for $300 per year. 29 U.S.C. § 186(b)(1); 18 U.S.C. 2.

Carmine was also charged with one count of personally receiving a payment of $300 from the Booth Fisheries Co. in violation of 29 U.S.C. § 186(b)(1). Prior to submission of the case to the jury, the court dismissed, at the prosecutor's request, a count charging Carmine with extortion, 18 U.S.C. § 1951, in connection with the receipt of that payment after the witness to that count failed to testify.

Finally, Peter was charged with perjury before the grand jury, 18 U.S.C. § 1623, and with obstruction of justice, 18 U.S.C. § 1503, in connection with his false statement that he did not possess any materials responsive to a subpoena duces tecum related to the union sign rentals.

I.

The Fulton Fish Market, located just south of the Brooklyn Bridge in lower Manhattan, is the source of most of the fresh fish sold in New York. Every day from about 2 a.m. to about 8 a.m. the market is packed with trucks delivering their perishable cargoes and with customers (mostly retailers and restaurateurs) picking up their day's requirements. The market is composed of two buildings, Old and New Markets, which together house about 80 wholesalers. The approximately 800 employees of these wholesalers, who are members of Local 359 of the United Seafood Workers Union, handle the fish from

the time it arrives in the market until the time that it leaves.

Carmine Romano was the Secretary-Treasurer of Local 359 from May 1974 until May 1980, when his brother, Peter Romano, took over. Carmine then assumed a newly created position (at $650/week) as the Executive Administrator of the Fulton Fish Market Welfare and Pension Trust Funds ("pension fund").

In 1975, the association of wholesalers located in the New Market, the New York Wholesale Fish Dealers Association ("Fish Dealers"), approached Carmine Romano for assistance in stopping the thefts plaguing the market. The existing watchmen's service was ineffective, and the Fish Dealers thought that Carmine would be able to protect them. The president of the Fish Dealers testified that "I figured that if the thieves knew that the union was looking out for us, that they wouldn't bother us. . . . Because they would be afraid of the union."

Shortly thereafter, Carmine created a watchmen's service called the Fulton Patrol Service. Although Carmine's name did not appear on any of the documents related to the Fulton Patrol, ample evidence tied him to the Patrol. For example, he presented the plan to the wholesalers and settled claims for reimbursement by companies that suffered thefts.

The Fish Dealers hired the Fulton Patrol Service for $1300 per week and the number of thefts in the New Market dropped dramatically. However, the Old Market, which had not hired the Fulton Patrol Service, continued to suffer high theft rates. Accordingly, in 1977 the Fulton Fishmongers Association (composed of the merchants located in the Old Market) ("Fishmongers") also hired the Fulton Patrol Service. Soon thereafter, the Old Market saw its pilferage rate drop. Between November

1975 and October 1981, the Fulton Patrol Service collected over $644,000 from the wholesale fish merchants located in the Fulton Fish Market.

Viewing the evidence in the light most favorable to the government, the jury could well have concluded that the Fulton Patrol's success in stemming the tide of thefts was due to the influence that Carmine and his co-conspirators exerted over the thieves in the market and not to the quality of its watchmen service. The deficiencies in the Patrol's operations were manifest. For example, one of the Patrol's watchmen (the brother-in-law of John Pontebbi, the man who ran the Patrol's day-to-day operations) was a kleptomaniac who was known to steal fish from the market himself. A number of watchmen listed on the the payroll (and whose checks were regularly cashed by union employees) did not exist. One watchman who did exist and who patrolled on Friday and Saturday nights had previously performed the same services for the prior, unsuccessful watchmen's service. He testified that he knew of only one other watchman who actually worked for the Patrol. Finally, a woman friend of Carmine's was paid $200 per week to receive "less than one call a week" from watchmen not reporting for work.

Substantial evidence also demonstrated the union's influence over the market's thieves. For example, Pontebbi put a former union delegate, Anthony O'Connor (charged in the indictment as a co-conspirator and presently a fugitive from justice), on the payroll because he thought O'Connor knew who the thieves were and could recover any fish that were stolen. Carmine's brother, Vincent Romano, was hired for the same reason at $450 per week. Although Pontebbi claimed that O'Connor and Vincent Romano were hired to watch the other watch-

men, none of the men who actually patrolled Fulton Market ever saw either man there.

Companies that suffered thefts came to Carmine Romano when they wanted reimbursement from the Fulton Patrol Service, which guaranteed against theft. After the burglary of Booth Fisheries, Carmine told the president of Booth that he "hoped to get the people that commited the burglary, and if they did . . . . they would be sorry they were born." After Peter took over control of Local 359, companies reported thefts to him.

The evidence also showed that the union systematically collected cash "Christmas payments" from the wholesalers in the Fulton Fish Market each December from 1975 through 1979. To insulate Carmine Romano and the other union officials, the payments were ordinarily solicited and collected by other businessmen, who told the solicitees that the money ($300 per wholesale stand per Christmas) was for "the boys at the union." A number of businessmen testified that they would not have made these "Christmas payments" if they had not been asked to, and that they believed the payments to be illegal. When asked why he had paid, Arnold Smith, of Caleby Haley & Co. said, "because everybody else was paying it and because we did not wish to create problems where no problems existed." In December of 1979, the Fishmongers Association gave $2400 to the union in lieu of individual contributions. This money was paid, as were all the contributions, in cash.

Occasionally, the union officers were directly involved in collecting the "Christmas payments." In December of 1977, either Carmine Romano or Anthony O'Connor approached the president of Commercial Fish Co., Philip Bartone, and said "everybody was going along giving to the boys [in the union] for Christmas," instructing Bar-

tone to drop the money off at the T & S Fish Co.[1] In December 1978, an employee of Booth Fisheries personally delivered Booth's $300 "Christmas present" to Carmine Romano.

Another method used to extract money from the Fulton Market merchants was the rental of cardboard union signs to them for $25 per month. The businessmen who rented these signs did so because everyone else was doing it and in spite of the fact that many of them believed the rentals to be illegal. Most testified that the signs (which arguably had some goodwill value) were not worth $25 per month—yet no one ever stopped renting. The president of N. P. Levy and Co., Terrence Levy, even placed the sign under the air conditioner, out of sight, while continuing to pay the $25 each month. Bartone testified that he rented the sign even though it wasn't worth the money because "I thought it was necessary to get [a union sign] to run the business. I didn't like the idea, but I thought it was necessary to continue running my business."

Another scheme by which Carmine Romano and his co-conspirators profited was through the misuse of union welfare and pension funds. Between 1974 and 1979, Carmine, as trustee of the pension fund, directed the deposit of over $168,000 of the pension fund's money in the Republic National Bank, keeping for himself and his co-conspirators over $10,000 worth of color television

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1 Following his instructions, Bartone gave $300 to Julius Sirowitz, the boss of the T & S Fish Co., telling him, "This is for the boys in the union." Sirowitz apparently collected "Christmas payments" from other wholesalers, too. For example, he told Terrence Levy, president of N.P Levy & Co., that he was "elected" to collect $300 for Carmine Romano and Anthony O'Connor. In this instance, however, Levy refused to pay because the union had not sent anyone to his father's funeral and he was still upset about the lack of respect that showed.

sets given by the bank as gifts to the sponsors of new accounts.

Republic National Bank officials testified that the bank gave these gifts regularly to the sponsors of new accounts. Only the sponsor, and not the account's owner, was eligible to receive the gift. However, the sponsor could designate anyone (other than the owner) to receive the gift. Moreover, if asked, the bank would have given cash rather than the television sets. Thus, the sponsors could have taken the gifts in the form of cash and turned it over to the pension fund. Here, however, the sponsors of the pension fund's new accounts (two union secretaries, the union accountant, and union delegate Anthony O'Connor) turned over to the pension fund none of the seventeen color television sets given by the bank as gifts for sponsoring the new accounts. Furthermore, if the moneys had been deposited in a commercial bank, rather than the Republic National Bank, the pension fund would have received $10,000 more in interest than it received from the Republic National Bank. Neither Romano nor the other trustees disclosed in the minutes of the pension fund that they had received these TV sets, nor did they disclose the gifts in the annual report to the beneficiaries of the pension fund or in reports required to be filed with the Department of Labor.

On January 14, 1981, Peter Romano in response to a subpoena requiring him to produce for the grand jury "All records, papers, correspondence, and documents in any way related to union shop cards, union signs or union plaques . . . ," falsely testified before the grand jury that he had no such documents. In fact, he had and knew that he had in his possession: (1) a telegram from the International President of the United Food and Commercial Workers Union (with which Local 359 was affiliated),

advising him that rental of union signs violated the union constitution, and (2) a copy of a letter from the International's Vice-President to the International President advising of a conversation with Peter Romano in which Romano had indicated he would immediately stop the rental of union placards.

Neither defendant took the stand at trial. Peter Romano called no witnesses; Carmine Romano called two witnesses who testified that the union's welfare and pension benefits increased during his tenure and that commercial banks offer some advantages over savings banks despite the lower rate of interest.

The trial concluded on October 30, 1981, when the jury convicted the defendants on all counts and found that they should forfeit their union positions under 18 U.S.C. § 1963. Prior to sentencing, the court revoked Carmine Romano's bail and remanded him to custody as a continuing danger to the community. We affirmed that order on November 3, 1981.

The court conducted a sentencing hearing on February 2 and 3, 1982, at which government witnesses testified to Carmine Romano's ties to the Genovese organized crime family, to the fear he generated in the Fulton Fish Market, and to his control of a number of illegal activities there. The court found that "the Fulton Fish Market is permeated by fear generated by organized crime, and . . . the proceeds of illegal activities are going to the coffers of organized crime . . ." It sentenced Carmine to twelve years and a $20,000 fine, noting that there "is enough in this case in connection with Mr. Carmine Romano, outside of what I heard and even the [sentencing] hearing here to justify the sentence that I am going to impose in this case."

## II.

The principal issue in this case is whether the receipt by Carmine Romano and his co-conspirators of television sets given by the Republic National Bank as gifts for the opening of accounts by the union pension fund constituted a crime under 18 U.S.C. § 1954. That statute punishes any trustee of an employee pension benefit plan who "receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of the actions, decisions, or other duties relating to any question or matter concerning such plan. . . ." Here, Carmine received (and aided others to receive) television sets as gifts because of his actions in directing the deposit of union pension funds, and with the intent to be influenced in the disposition thereof.[2] Carmine concedes that his conduct falls "within the literal sweep of the statute's language." However, he argues that the receipt of those gifts was not illegal because it was proper to deposit union pension funds in a bank that gives gifts to all members of the public opening accounts. Although keeping the television sets might have constituted embezzlement, he argues, their receipt was lawful. We disagree.

Romano's argument rests on indications in the legislative history that Congress was most concerned with kickbacks. Since the gifts-for-deposit were not kickbacks, but were offered on non-preferential basis to all depositors,

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2 Although § 1954 does not require proof of a corrupt intent, the court instructed the jury that to convict on these counts it had to find that the defendant acted with a "bad purpose," and "with the specific intent to do something the law forbids." By its verdict, the jury necessarily found that Carmine Romano received the gifts with corrupt intent. The defendant did not object to these instructions.

he argues that the statute should not be interpreted to reach his conduct. And indeed, kickbacks were the main concern of Congress. *See* S. Rep. No. 908, 87th Cong., 1st Sess., 4-5, 11 (1961); 108 Cong. Rec. 1730 (remarks of Rep. Roosevelt) (1962). However, the legislative history reveals that Congress intended to reach "other conflict-of-interest payments" as well as kickbacks. H.R. Rep. No. 998, 87th Cong. 1st Sess. 7 (1961), and to establish "Federal criminal sanctions for violations of trust." 108 Cong. Rec. 1924 (1962) (remarks of Sen. McNamara). Thus, Congress used very broad language to prohibit receipt of "any fee, kickback, commission, gift, loan, money, or thing of value," rather than just kickbacks. Moreover, the statute punishes the receipt of any of these things either "because of," or "with the intent to be influenced" with respect to, any action or decision concerning a pension fund. If only corrupt transactions were intended to be covered, Congress would not have added the "because of" clause, but would have limited the statute to those possessing the intent to be influenced.[3] In short, the broad language used in the statute reflects Congress's intent to reach all fiduciaries who profit (other than by their regular compensation) as the result of their decisions to invest union pension funds.[4]

Romano also claims that this construction of the statute is a "technical" one that punishes the receipt of

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[3] Even if Congress intended to limit the statute to corrupt transactions, the jury found that Carmine Romano possessed the corrupt intent to be influenced in the deposit of the union's pension funds. *See* note 2, *supra*.

[4] The statute expressly permits a fiduciary to receive a "bona fide salary" or "compensation" for "services actually performed in the regular course of his duties as . . . trustee. . . ." 18 U.S.C. § 1954. Of course, the defendant's receipt of the television sets was not such compensation.

"customary" business gifts and is therefore contrary to the interpretation of the Department of Justice. S. Rep. No. 908, 87th Cong., 1st Sess., 15-16 (1961). However, the receipt of over $10,000 worth of color television sets cannot be deemed a "de minimis business or social gratuit[y]." *Id.* Nor, in view of the jury's finding that Carmine had the specific intent to violate the statute, can this be deemed a "technical," innocent violation.

Romano's argument that he should have been prosecuted for embezzlement under 18 U.S.C. § 664 rather than under § 1954 is also unavailing. Section 664 punishes the embezzlement of "any of the moneys, funds, securities, premiums, credits, property, or other assets of any" union pension plan. Had Carmine been charged under this statute, he surely would have argued that the television sets were not the property of the pension plan, as the bank did not give (and would not have given) the sets to the pension fund, but only to the individual sponsors of new accounts.

Next, Carmine Romano argues that the district court improperly admitted evidence of the "Christmas payments," the Fulton Patrol Service, and the state of mind of the wholesalers. This evidence, he asserts, was irrelevant and prejudicial. These errors were compounded, he claims, by the prosecutor's summation and rebuttal.

We find no error in the district court's evidentiary rulings. Count One of the indictment charged Carmine with conspiring to conduct the affairs of the Fulton Fish Market through a pattern of racketeering activity. This pattern was alleged to include extortion in the form of the Fulton Patrol Service protection racket, the collection of "Christmas" gifts from the Fulton Market merchants, and the "rental" of union placards. Clearly, proof of such activities was relevant to the charge of conspiracy, as was

proof that the wholesalers made these payments to the union of fear. Carmine's complaint seems to be that the court instructed the jury only as to the predicate acts of racketeering activity charged in the substantive RICO count, which did not include extortion. However, his failure to object to the charge bars that claim here.

Second, we hold that the prosecutor's repeated references to the fear generated by Carmine Romano in the Fulton Fish Market were not improper. In his summation, the prosecutor was entitled to argue that the conspiracy charge—which alleged payments extracted through the use of fear—had been proven by the evidence. Nor was the rebuttal improper in view of the defendants' closing arguments that the union sign rentals did not constitute extortion and that there was no evidence that the wholesalers "signed that [rental] agreement out of fear, out of threats, out of intimidation."[5]

The defendants also argue that their convictions for conspiracy must be reversed because the conspiracy count was predicated on Taft-Hartley violations, 29 U.S.C. § 186(b)(1), which require no *mens rea* (*i.e.*, knowing or criminal intent). They reason that "one cannot conspire to commit a crime which does not require proof of *mens rea*." However, the defendants were not charged with conspiring to violate the Taft-Hartley Act; they were charged with conspiracy to violate the RICO statute, 18 U.S.C. § 1962. Moreover, the court instructed the jury that it must find intent to conspire, and that "with an understanding of the unlawful character of a plan, [the defendant] knowingly and wilfully join[ed] in an unlawful

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[5] Defendants also claim that the prosecutor improperly argued that the "union plaque was a fake and a sham and the International Secretary had never signed it." The prosecutor's remarks were fair comment on the physical evidence and went to the defendants' intent to conspire to violate the RICO statute.

scheme." To the extent that conspiracy requires proof of "corrupt motive or intent," as the defendants claim, the charge gave the defendants everything to which they were entitled. *See United States v. Scotto*, 641 F.2d 47, 55-56 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981).[6]

Nor is there any merit to Carmine Romano's claim that the twelve-year sentence imposed on him was improper because the district court did not make specific findings after the sentencing hearing and thus may have relied on false information in sentencing him more severely than his brother. The district court specifically stated that the sentence was justified by what it knew of Carmine Romano's background even without reference to the sentencing hearing.[7] Indeed, our review of the trial transcript suggests that the sentence was lenient.

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6 The defendants argue that the enhancement of non-*mens rea* misdemeanors (the Taft-Hartley violations) into a felony under RICO, 18 U.S.C. § 1962(c), is unconstitutional. This argument is frivolous. *United States v. Scotto, supra.*

7 The court may have been referring to the fact, emphasized by the prosecutor in his argument at the sentencing hearing, that two witnesses had chosen to suffer imprisonment for contempt rather than testify at trial following the grant of immunity. One, Alec B. Messing, of the Messing Fish Co., had already served 90 days and been fined $66,000 for a similar refusal to testify in a parallel civil case. Messing's lawyer told the court (out of the presence of the jury) that the reason his client refused to testify was that death threats had been made against Messing and his family. Similarly, Glenn Kaggen, an employee of Messing Fish Co., continued to refuse to testify even after the judge sentenced him to six months imprisonment for civil contempt. He told the judge the reason he would not answer any questions was "fear."

Moreover, there was ample evidence adduced at trial showing that Carmine was feared throughout the Fulton Fish Market. For example, the union's long time accountant, Walter Cole, admitted (after a minute of dead silence in which he weighed his answer) that the reason he lied to the grand jury about Carmine's participation in the Fulton Patrol Service was because he was afraid of Carmine. Frank Bearese, of the Finest Fillet Co., testified that when he was first asked for a $300 Christmas payment to the union in 1975, he felt "[s]ort of a sick feeling in my stomach because it had never happened before in all the years I have been down in the market."

The claim that the defendants were deprived of a public trial because the district court locked the courtroom doors while it charged the jury is frivolous. Members of the public were permitted to be and were present within the courtroom during the charge. Locking the door while the charge was read was a reasonable limitation to ensure that the jury was properly instructed without distraction. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581-82 n.18 (1980). Indeed, no one even tried to enter the courtroom while the doors were locked.

Equally without merit is Peter Romano's claim that he was denied due process because the government failed to give him fair notice that rental of union signs violated the Taft-Hartley Act even though he assumed union office one year after the Government began its investigation. The government was under no obligation to inform him that his conduct violated the law. That obligation arises only in those rare cases where the "conduct made criminal is wholly passive and . . . 'circumstances which might move one to inquire as to the statutory duty are completely lacking.'" *United States v. Keuylian*, 602 F.2d 1033, 1043 (2d Cir. 1979). Here, the collection of money from the Fulton Market merchants could hardly be described as "wholly passive." And it stretches the imagination to suggest that in these circumstances Peter Romano was completely unaware that such transactions were illegal.

Peter Romano also claims that his false grand jury testimony was not material. He does not contest the sufficiency of the evidence that he deliberately lied when he told the grand jury that he held no documents responsive to a subpoena duces tecum seeking records relating to rental of union signs to employers. Those documents, if produced, would clearly have helped the grand jury

inquiry. For example, they were probative of his state of mind, which was relevant to the possible RICO and extortion charges. Thus, the perjury was material under 18 U.S.C. § 1623. *See United States v. Berardi*, 629 F.2d 723, 728 (2d Cir.), *cert. denied*, 449 U.S. 995 (1980).

The defendants' final claim is that the district court erred in admitting the hearsay evidence about the Christmas payments. Eight wholesalers testified that they made cash "Christmas payments" to other wholesalers at the request of the latter, and were told that the money was for the union. The issue is whether the district court clearly erred in finding there was sufficient independent evidence that there was a conspiracy, that each defendant was a member of that conspiracy, and that the statements were made in furtherance of that conspiracy. *See United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). After reviewing the trial record, we cannot say that the district court's finding was clearly erroneous. For example, Carmine Romano personally accepted one of the "Christmas payments." Peter Romano admitted to one wholesaler that people in the market gave money to the union at Christmas time. The evidence linking the co-conspirators to the conspiracy is the fact that they picked up the money. Even if the district court's *Geaney* finding was clearly erroneous, the requests to give the money to the "boys in the union" were admissible as "an utterance which was contemporaneous with an independently admissible nonverbal act . . . and which relates to that act and throws some light upon it." *United States v. Glasser*, 443 F.2d 994, 999 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971).

Accordingly, the judgments of conviction are affirmed. The mandate shall issue forthwith.

## CHARGE TO THE JURY WITH RESPECT TO 18 U.S.C. 186

"The final element that the government must prove in connection with these counts beyond a reasonable doubt is that with respect to the count in question the defendant acted unlawfully, wilfully, and knowingly. Now, I am going to define that term again for you as it relates to the other counts, but with respect to these counts, 15 through 60 with respect to the Carmine Romano, and 61 through 91 with respect to Peter Romano, those words, 'unlawfully, wilfully, and knowingly' have a distinct and different meaning.

---

With respect to these charges a defendant acts unlawfully if he wilfully and knowingly performs conduct forbidde by the statute. In this context, conduct that is done wilfully and knowingly is conduct that is done deliberately and voluntarily. To prove a violation of these provisions of the Taft-Hartley Act with respect to these counts, the government need not prove that the defendant knew abounod e Taft-Hartley Act or acted with a bad purpose or a specific purpose to violate the statute. What the government must prove beyond a reasonable doubt is that the defendant you are considering requested, received or accepted, or agreed to accept or receive money which he knew was from an employer of members of Local 359 or of workers who would be admitted to membership by 359, and he requested, or accepted the money or anything of value voluntarily, not because of mistake, accident, or inadvertence or as I will define it for you later, that he aided and abetted Local 359 in requesting and receiving such money.

Now, to satisfy that element of unlawfully, wilfully, and knowingly under these charges, the government must prove beyond a reasonable doubt that the defendant requested, received, or accepted money with knowledge that

he was requesting, receiving, or accepting money on behalf of Local 359 or an officer of Local 359, and with knowledge that the person who was giving him the money was an employer of employees that Local 359 represented." (Tr. 1512-1514).

* * *

"With respect to the Taft-Hartley counts—and those are Counts 15 through 60, and 61 through 91, and 92—I ask you to listen carefully to my explanation of the terms 'knowingly' and 'wilfully.' They have a different meaning with respect to these charges than they do with regard to the other charges in the indictment.

With respect to these charges, a defendant acts unlawfully if he wilfully and knowingly performs conduct forbidden by the statute. Conduct that is done wilfully and knowingly is conduct that is done deliberately and voluntarily and not because of accident, mistake, or other innocent reason. To prove a violation of the Taft-Hartley Act, the government need not prove that the defendant knew about the Taft-Hartley Act or acted with a bad purpose or a specific purpose to violate that statute. The government must prove beyond a reasonable doubt that the defendant you are considering requested, received or accepted, or agreed to receive or accept money which he knew was from an employer of members of Local 359 or of workers who would be admitted to membership by Local 359, and requested or received or accepted the money or thing of value voluntarily and not because of mistake, accident, or inadvertence, or that he aided and abetted Local 359 in receiving such money." (Tr. 1568-1569).

## CONSTITUTIONAL PROVISIONS INVOLVED

### AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

### AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**18 U.S.C. 1954**
**Offer, acceptance, or solicitation to influence operations of employee benefit plan**

Whoever being—

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

(2) an officer, counsel, agent, or employee of an employer or an employer of any of whose employees are covered by such plan; or

(3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or

(4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan

receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money or thing of value because of or with intent to be influenced with respect to, any of the actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined not more than $10,000 or imprisoned not more than three years, or both: *Provided*, That this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

As used in this section, the term (a) "any employee welfare benefit plan" or "employee pension benefit plan" means any employee welfare benefit plan or employee pension benefit plan, respectively, subject to any provision of title I of the Employee Retirement Income Security Act of 1974, and (b) "employee organization" and "administrator" as defined respectively in sections 3(4) and (3)(16) of the Employee Retirement Income Security Act of 1974.

18 U.S.C. 1961
Definitions

As used in this chapter—

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering

paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

* * * * *

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

18 U.S.C. 1962
Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest

in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

**29 U.S.C. 186**

**Restrictions on financial transactions**

**Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations.**

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

**Request, demand, etc., for money or other thing of value**

(b) (1) It shall be unlawful for any person to request, de-

mand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

**29 U.S.C. 1109**
**Liability for breach of fiduciary duty**

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

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Nos. 82-322 and 82-329

# In the Supreme Court of the United States

OCTOBER TERM, 1982

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CARMINE ROMANO, PETITIONER

*v.*

UNITED STATES OF AMERICA

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PETER ROMANO, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

REX E. LEE
*Solicitor General*

D. LOWELL JENSEN
*Assistant Attorney General*

JOEL M. GERSHOWITZ
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1954 prohibits a trustee of a union pension fund from accepting television sets from a bank as gifts for opening accounts with pension fund assets.

2. Whether the district court properly instructed the jury on the element of willfulness under the Taft-Hartley Act, 29 U.S.C. 186.

3. Whether petitioner Carmine Romano's convictions under the RICO statute, 18 U.S.C. 1962, violated the Due Process Clause of the Fifth Amendment, because the alleged "racketeering activities" included criminal offenses not requiring mens rea.

4. Whether the district court deprived petitioners of their right to a public trial by locking the courtroom while it charged the jury.

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# In the Supreme Court of the United States

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*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a )[1] is reported at 684 F.2d 1057.

### JURISDICTION

The judgment of the court of appeals was entered on June 24, 1982. The petitions for a writ of certiorari were filed on August 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1 ).

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[1]References are to the appendix in No. 82-322.

## STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner Carmine Romano was convicted on one count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c) (Count 2); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d) (Count 1); 12 counts of misusing union pension funds, in violation of 18 U.S.C. 1954 and 2 (Counts 3-14); 46 counts of aiding and abetting the receipt of illegal labor payments, in violation of the Taft-Hartley Act, 29 U.S.C. 186(b)(1), and 18 U.S.C. 2 (Counts 15-60); and one count of personally receiving an illegal labor payment, in violation of 29 U.S.C. 186(b)(1) (Count 92). Petitioner Peter Romano was convicted on the RICO counts (Counts 1 and 2); on 31 Taft-Hartley counts (Counts 61-91); on one count of perjury before a grand jury, in violation of 18 U.S.C. 1623 (Count 166); and on one count of obstructing justice, in violation of 18 U.S.C. 1503 (Count 167).

Carmine Romano was sentenced to concurrent 12-year terms of imprisonment on Counts 1 and 2; one year's imprisonment on Counts 3 to 14, to be served consecutively to each other but concurrently with the sentence on Counts 1 and 2; and six months' imprisonment on Counts 15 to 24, 34 to 60, and 114, to be served consecutively to each other but concurrently with the sentences on the other counts. In addition, he was fined $10,000 on each of Counts 1 and 2. Peter Romano was sentenced to concurrent 18-month terms of imprisonment on Counts 1 and 2; six months' imprisonment on Counts 61 to 91, to be served concurrently with each other and with the sentences on Counts 1 and 2, and five years' imprisonment on Counts 166 and 167, all but six months of which were suspended, to be served

concurrently with the sentences on the other counts. In addition he received a five-year term of probation. The court of appeals affirmed (Pet. App. 1a-18a).

1. The evidence as summarized in the opinion of the court of appeals showed as follows. Petitioner Carmine Romano was the Secretary-Treasurer of Local 359 of the United Seafood Workers Union in New York City from May 1974 until May 1980, when his brother, petitioner Peter Romano, succeeded him. Carmine then assumed a newly created position as the Executive Administrator of the Fulton Fish Market Welfare and Pension Trust Funds, and thus he became a trustee of the Union's pension fund (Pet. App. 6a).

In 1975, the New York Wholesale Fish Dealers Association asked Carmine for assistance in stopping thefts that were plaguing the Fulton Fish Market. Shortly thereafter, Carmine created a watchmen's service called the Fulton Patrol Service. Between November 1975 and October 1981, the Patrol Service collected over $644,000 from the wholesale fish merchants (Pet. App. 6a-7a).

The Patrol Service's success in reducing the incidents of theft was due more to the influence of Carmine and his co-conspirators over the thieves than to the quality of the watchmen's service. For instance, John Pontebbi, who ran the Patrol Service on a day-to-day basis, hired Anthony O'Connor because he thought O'Connor knew who the thieves were and thus could recover the stolen fish (Pet. App. 7a).[2]

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[2]Carmine's brother Vincent was hired for the same reason. Moreover, a number of watchmen listed on the payroll did not exist (though their checks were cashed), one of the watchmen was a kleptomaniac who stole fish from the market himself, and another watchman who did patrol the market knew of only one other watchman who actually worked for the Patrol Service (*id.* at 7a).

In addition, the union systematically collected cash "Christmas payments" from the wholesalers each December from 1975 through 1979. The payments were ordinarily solicited and collected by other businessmen, who told the fish merchants that the money was for "the boys at the union" (Pet. App. 8a). Many merchants, who believed the payments were illegal, would not have made them but for the request on behalf of petitioners (*ibid.*).[3]

The union also extracted money from the Fulton Market merchants through the rental for $25 per month of cardboard union signs. The businessmen who rented these signs did so because everyone else was doing it and in spite of the fact that many of them believed the rentals were illegal. Almost no merchant believed the signs were worth $25 per month (Pet. App. 9a).

In addition, Carmine and his co-conspirators profited through the misuse of union welfare and pension funds. Between 1974 and 1979, Carmine, as trustee of the pension fund, directed the deposit of over $168,000 of the pension fund's money into the Republic National Bank, keeping for himself and his co-conspirators over $10,000 worth of color television sets given by the bank as gifts to the sponsors of the new accounts. The sponsors could have taken the gifts in the form of cash and contributed the money to the pension fund, but did not do so. Moreover, depositing the money in the Republic National Bank instead of a commercial bank cost the pension fund approximately $10,000 in interest. Neither Carmine nor the other trustees disclosed in the

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[3]Occasionally, the union officers were directly involved in collecting the "Christmas payments." In December of 1977, either Carmine or Anthony O'Connor requested the president of Commercial Fish Co., Philip Bartone, to drop his Christmas payment off at the T&S Fish Co. In December 1978, an employee of Booth Fisheries personally delivered Booth's $300 "Christmas present" to Carmine (*id.* at 8a-9a).

minutes of the pension fund that they had received these TV sets, nor did they disclose the gifts in the annual report to the beneficiaries of the pension fund or in reports required to be filed with the Department of Labor (Pet. App. 10a).

When the district court prepared to deliver its instructions to the jury, it ordered the courtroom doors locked, over petitioners' objection, in order to eliminate unnecessary distractions. No one in the courtroom was required to leave, and no one tried to enter the courtroom during the time the doors were locked (Pet. App. 17a).

2. The court of appeals affirmed petitioners' convictions (Pet. App. 1a-18a). It held that 18 U.S.C. 1954, which prohibits a trustee of a pension fund from receiving "any" gift "with intent to be influenced with respect to, any" decisions concerning the pension fund was violated by petitioner Carmine Romano's receipt of television sets in return for approving the deposit of the union fund's assets in Republic National Bank accounts (Pet. App. 12a-14a). The court also rejected as "frivolous" (*id.* at 16a n.6) petitioners' claim that it would violate due process to convert their misdemeanor Taft-Hartley violations (29 U.S.C. 186(b)(1)), which did not require proof of mens rea,[4] into a felony on the basis of the RICO statute, 18 U.S.C. 1962(c). Finally, the court held that closing the courtroom doors during the instructions was a "reasonable limitation to ensure that the jury was properly instructed without distraction" (Pet. App. 17a).

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[4]Petitioners acknowledged in their appeal briefs that the Second Circuit previously had held in a long line of cases (see page 8, *infra*) that 29 U.S.C. 186(b)(1) does not require proof of criminal intent, but they preserved this issue by requesting the court of appeals to reconsider its decisions (82-1052 App. Br. 59; 82-1054 App. Br. 42). The court of appeals did not, however, discuss this issue in its opinion.

## ARGUMENT

1. Petitioner Carmine Romano contends (82-322 Pet. 7-16) that his receipt of television sets from the Republic National Bank as gifts for opening accounts on behalf of the union pension fund fell outside the scope of 18 U.S.C. 1954. This claim is without merit.

Section 1954 prohibits a pension fund trustee, which petitioner Carmine Romano was, from receiving "any * * * gift * * * with intent to be influenced with respect to, any of the actions * * * relating to any question or matter concerning such plan * * *." Apparently conceding that his actions violate the literal meaning of Section 1954 (Pet. 8), petitioner contends that the legislative history of the statute indicates that Congress was concerned with kickbacks and that gifts-for-deposit, which are offered on a nonpreferential basis to all depositors, are not kickbacks.

To be sure, kickbacks to pension fund trustees were the main concern of Congress in enacting Section 1954. See S. Rep. No. 908, 87th Cong., 1st Sess. 4-5, 11 (1961); 108 Cong. Rec. 1730 (1962) (remarks of Rep. Roosevelt). But the legislative history reveals that Congress intended to reach "other conflict-of-interest payments" (H.R. Rep. No. 998, 87th Cong., 1st Sess. 7 (1961), and to establish "[f]ederal criminal sanctions for violations of trust." 108 Cong. Rec. 1924 (1962) (remarks of Sen. McNamara). Consistent with this intent was Congress' use of very broad language to describe the activities prohibited by the statute. Petitioner Carmine Romano points to nothing in the legislative history that indicates that Congress did not intend "to make punishable all conduct falling within the reach of the

statutory language." *United States* v. *Culbert*, 435 U.S. 371, 377 (1978).[5]

2. Petitioners next contend (82-322 Pet. 16-19; 82-329 Pet. 2 n.1) that the district court improperly instructed the jury on the element of willfulness under the Taft-Hartley Act, 29 U.S.C. 186. The district court instructed the jury that "the government need not prove that the defendant knew about the Taft-Hartley Act or acted with a bad purpose or a specific purpose to violate the statute" (Tr. 1512-1513). Petitioner argues that the court erred in failing to instruct the jury that it was required to find that petitioner knew his actions were unlawful or that he acted with a reckless disregard of their lawfulness.

In *United States* v. *Ryan*, 350 U.S. 299, 305 (1956), this Court reviewed the legislative history of Section 186 and observed that it is "a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative." Subsequently, the Second Circuit has ruled in a series of cases that Section 186

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[5]Petitioner's reliance (82-322 Pet. 14) on a letter from the Department of Justice to Congress during the latter's consideration of Section 1954 is misplaced. See S. Rep. No. 908, 87th Cong., 1st Sess. 15-16 (1961). Although the Department did express concern about applying the statute to "de minimis business or social gratuities" (*id.* at 16), the court of appeals correctly found that "the receipt of over $10,000 worth of color television sets cannot be deemed a 'de minimis business or social gratuit[y]' " (Pet. App. 14a).

Petitioner further argues (82-322 Pet. 15-16) that because Section 1954 punishes the donor as well as the recipient of the "gift," the court's construction of the statute could make bankers "criminally liable for the widespread use of nonpreferential gifts-for-deposit." Petitioner overlooks, however, that it was the receipt of the television sets *for his own use* and his failure to turn them over to the pension fund that violated Section 1954. Accordingly, a banker would be liable under the statute only if he knew that a pension fund trustee intended to keep the "gift" for himself.

does not require proof of knowledge that the conduct is illegal, and has approved the substance of the instructions given by the district court. This Court has consistently declined to review those decisions. See *United States* v. *Overton*, 470 F.2d 761, 767 (2d Cir. 1972), cert. denied, 411 U.S. 909 (1973); *United States* v. *Ricciardi*, 357 F.2d 91, 100 (2d Cir.), cert. denied, 384 U.S. 942 (1966). See also *United States* v. *Scotto*, 641 F.2d 47, 55 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981); *United States* v. *Boylan*, 620 F.2d 359, 361-362 (2d Cir.), cert. denied, 449 U.S. 833 (1980). Nothing in the present case makes it more deserving than those cases of this Court's consideration.[6]

Notwithstanding petitioner's assertion (82-322 Pet. 17-19), the decision below does not conflict with holdings of the Seventh and Tenth Circuits. Any contrary suggestion in the language of the Seventh Circuit's decision in *United States* v. *Inciso*, 292 F.2d 374, 380, cert. denied, 368 U.S. 920 (1961), has been disapproved by the later decision of that court in *United States* v. *Keegan*, 331 F.2d 257, 261-262, cert. denied, 379 U.S. 828 (1964), which held that in a prosecution under 29 U.S.C. 186, the jury need not be instructed that the defendant must have acted with knowledge of the law. The *Keegan* court thus approved an instruction that "[t]he word 'knowingly' * * * does not require * * * that there be any knowledge or awareness that such act or omission is in fact prohibited by law." 331 F.2d at 261. Accordingly, the instruction given here almost certainly would be acceptable in the Seventh Circuit.[7]

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[6]The Third Circuit is squarely in agreement with the Second Circuit's interpretation of 29 U.S.C. 186. See *United States* v. *Pecora*, 484 F.2d 1289, 1294 (3d Cir. 1973); *United States* v. *Lanni*, 466 F.2d 1102, 1110 (3d Cir. 1972).

[7]Petitioner Carmine Romano errs in suggesting that either *United States* v. *Kaye*, 556 F.2d 855, 863-864 (7th Cir.), cert. denied, 434 U.S. 921 (1977), or *United States* v. *Simpson*, 561 F.2d 53, 61-62 (7th Cir.

In *Korholz* v. *United States*, 269 F.2d 897, 903 (10th Cir. 1959), cert. denied, 361 U.S. 929 (1960), the Tenth Circuit termed as "accurate" an instruction that required the jury to find either specific intent to violate Section 186 or reckless disregard for the law, but the court did so in the course of affirming a conviction based on the more stringent instruction. Since the instruction approved there was favorable to the defendants, the court was not called upon to decide whether such an instruction was necessary. Clearly a holding that the charge requested by a defendant was not prejudicial to him is a far cry from a holding that such a charge is necessary. Accordingly, there is no reason to assume the Tenth Circuit would reach a result different from the holding below in a case in which the substantive standard for willfulness was contested by a defendant as inadequate.

3. The "racketeering activities" upon which petitioner Carmine Romano's RICO convictions were predicated included Taft-Hartley violations, 29 U.S.C. 186(b)(1). Petitioner contends (82-322 Pet. 19-21) that Taft-Hartley violations may not, consistent with the Due Process Clause of the Fifth Amendment, serve as predicate acts of racketeering because they contain no mens rea element.[8]

The RICO charges against petitioner, however, were predicated on several violations of 18 U.S.C. 1954, as well as on the Taft-Hartley violations. Since the jury convicted petitioner on the substantive counts charging the violations of Section 1954, it is clear that it believed petitioner

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1977), supports his position. The only question in *Kaye* was the sufficiency of the evidence. The opinion does not set forth the district court's charge, but expressly restates the holding in *Keegan* on this point. *Simpson* did not involve Section 186 at all.

[8]Petitioner does not dispute that under 18 U.S.C. 1961(1)(C) " 'racketeering activity' means * * * any act which is indictable under title 29, United States Code, section 186 * * *."

committed at least two acts of racketeering apart from the Taft-Hartley offenses. Accordingly, even if petitioner were correct on the merits, his RICO convictions would not be affected.

In any event, petitioner's claim is unfounded. The district court instructed the jury that to be guilty of a substantive RICO offense a defendant must act "wilfully" (Tr. 1556) and "with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law" (Tr. 1522-1523, 1524-1525, 1568-1569). The court similarly instructed that a defendant could not be found guilty of conspiracy unless, "with an understanding of the unlawful character of a plan, [he] knowingly and wilfully joins in an unlawful scheme" (Tr. 1561-1562). Moreover, the court clearly explained to the jury the difference between the intent required to violate the Taft-Hartley Act and the "criminal intent" necessary to violate or conspire to violate the other offenses charged (Tr. 1512-1513, 1522-1523, 1524-1525, 1568-1569). It is therefore simply not true that the inclusion of Taft-Hartley offenses as predicate acts of racketeering enabled the jury to convict petitioner on the RICO counts without a finding of criminal intent. Accordingly, petitioner's claim must fail.

4. Petitioners contend (82-322 Pet. 22-24; 82-329 Pet. 3-10) that the closing of the courtroom doors during the district court's charge to the jury violated their right to a public trial in violation of the Sixth Amendment. This contention is frivolous.

The Sixth Amendment, of course, guarantees the accused a right to a public trial. See, *e.g.*, *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 580 (1980) (opinion of Burger, C.J.); *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 382-384 (1979). But "[t]he requirement of a public trial is satisfied by the opportunity of members of the public and

the press to attend the trial and to report what they have observed." *Chandler* v. *Florida*, 449 U.S. 560, 569 (1981), quoting *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 610 (1978). Here, any member of the public or press who wished to observe the charge to the jury was allowed access to the courtroom. In fact, several members of the public were in the courtroom throughout the jury charge, and no one was actually denied entrance to the courtroom (Pet. App. 17a).

Moreover, to the extent that the practice of closing the courtroom during instructions implicates the Sixth Amendment at all, it is apparent that the Court's order was a reasonable limitation on courtroom traffic and noise designed to eliminate distraction of the jury during the critical charging period. As the Chief Justice recently observed in *Richmond Newspapers, Inc.* v. *Virginia*, *supra*, 448 U.S. at 581-582 n.18: "Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic, see, *e.g.*, *Cox* v. *New Hampshire*, 312 U.S. 569 (1941), so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial * * *. It is far more important that trials be conducted in a quiet and orderly setting than it is to preserve that atmosphere on city streets." See also *Gannett Co.* v. *DePasquale*, 443 U.S. at 388 n.19 (trial court has broad discretion to control spectators in courtroom); *United States ex rel. Orlando* v. *Fay*, 350 F.2d 967 (2d Cir. 1965), cert. denied, 384 U.S. 1008 (1966).[9] The decision

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[9]The state cases upon which petitioner Peter Romano relies do not aid his cause. In *McKibben* v. *State*, 187 Ga. 651, 2 S.E.2d 101 (1939), *People* v. *Buck*, 46 Cal. App. 558, 116 P.2d 160 (1941), and *State* v. *Gibb*, 303 N.W.2d 673 (Iowa 1981), the courts rejected claims similar to petitioners' claim here. In *People* v. *Micalizzi*, 223 Mich. 580, 194 N.W. 540 (1923), one of the defendant's attorneys was among those excluded

to close the courtroom doors for a short period to assist the jury is reasonable and raises no issue warranting review by this Court.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
*Solicitor General*

D. LOWELL JENSEN
*Assistant Attorney General*

JOEL M. GERSHOWITZ
*Attorney*

OCTOBER 1982

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from the courtroom during the reading of the instructions to the jury. In *State* v. *Lawrence*, 167 N.W.2d 912 (Iowa 1969), the courtroom was completely emptied of spectators before the instructions were read.

Nor is Peter Romano aided by his telephonic survey (82-329 Pet. 8-10). That approximately half of the jurisdictions in the country do not close the courtroom during the jury charge—assuming such is the case—does not in any way suggest that those jurisdictions interpret the Sixth Amendment as prohibiting such action.

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NO. 82-322

IN THE
# Supreme Court of the United States

OCTOBER TERM, 1982

CARMINE ROMANO,
*Petitioner,*

*v.*

UNITED STATES OF AMERICA,
*Respondent.*

## Petitioner's Reply Brief

LOUIS J. MARTINE
DOLAN, McMAHON & MARTINE
*Attorneys for Petitioner*
120 Broadway
New York, N.Y. 10271
(212) 732-8618

NORMAN A. OLCH
*Of Counsel on the Petition*
233 Broadway
New York, N.Y. 10279
(212) 964-6171

Dirk Printing Press 260 Richmond Avenue ■ Staten Island, New York 10302
TEL.: (212) 447-5350 — (516) 222-0470 — (914) 682-0648

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# PETITIONER'S REPLY BRIEF

## POINT I

## THE GOVERNMENT'S INTERPRETATION OF 18 U.S.C. 1954 FINDS NO SUPPORT IN THE LANGUAGE OF THE STATUTE OR IN ITS LEGISLATIVE HISTORY.

While the Government agrees that 18 U.S.C. 1954 is directed towards kickbacks and payoffs (Br. Opp. 6), it argues that the statute also seeks to punish the receipt of any conflict of interest payment. This mistaken view is based solely upon the isolated remark of one Senator, and is wholly at odds with the detailed legislative history which clearly evinces a Congressional effort to punish highly corrupt payments. (Pet. App. 9-11). Nothing in the legislative history suggests that Congress sought to turn every conflict of interest payment into a federal crime, and the Government's view to the contrary is also at odds with the general legislative scheme of imposing civil penalties on a pension fund trustee for a breach of a fiduciary responsibility. 29 U.S.C. 1109.

Second, while the Government agrees that customary business gifts are not embraced by the statute (Br. Opp. 7 n.5), and the Government does not deny that gifts-for-deposits on a nonpreferential basis is a customary and widespread practice in the banking world, the Government nevertheless contends that $10,000 worth of television sets is embraced by the statute. The $10,000 figure, if accurate, is seriously misleading because it represents the aggregate value of gifts alleged in many counts of the indictment. The issue here, as it was at the trial, is not whether $10,000 worth of customary gifts over a three-year period violates Section 1954, but whether *each gift* as alleged in the individual counts of the indictment violates Section 1954.*

Finally, although the Government agrees that under Section 1954 both the donor and the recipient of the gift are equally culpable, it argues that bankers would not be criminally liable for the widespread use of nonpreferential gifts-for-deposit unless they know the pension fund trustee intends to keep the gift for himself and not turn it over to the fund. (Br. Opp. 7 n.5). But such an interpretation is wholly at odds with the Government's theory of the prosecution in the courts below and with the facts of this case.

The evidence showed that of the seventeen television sets covered by various counts of the indictment, petitioner, according to bank records, received four. The remainder went to friends and business associates and petitioner was charged as an aider and abettor.

*The Government's approach to Section 1954 would also give it unfettered discretion to prosecute under 1954 because in its opinion an admittedly customary gift is worth too much.

Furthermore, the evidence showed that under the bank rules then extant, the fund could not receive the gifts, and the bank knew the gifts were going to fund trustees and employees or their designees. Indeed, because the statute punishes those who give gifts to influence pension-fund deposit decisions, and in practically all instances, as in this case, the bank will know the funds belong to a pension fund, it would be the rare case in which a banker would not be liable under the statute if the Second Circuit's interpretation is left to stand.*

In sum, the Government has made no showing that the widespread banking practice of gifts-for-deposits is embraced by Section 1954.

Respectfully submitted,

LOUIS J. MARTINE
NORMAN A. OLCH
*Attorneys for Petitioner*

*The Government's contention that the violation of Section 1954 was not the receipt of the gifts, but the later failure to turn them over to the fund (Br. Opp. 7 n.5), may spell out the crime of embezzlement under 18 U.S.C. 664. But this was not the charge in the indictment. In addition, turning petitioner's proper receipt of the television sets into a crime because of his *later* failure to deliver them to the pension fund, violates the principles of *U.S. v. Carbone*, 327 U.S. 633 (1943) and *Arroyo v. United States*, 359 U.S. 419 (1959).